SUBJECT INDEX

PAGE

Statement of the case 1

Argument 12

I.

The decision of the Court of Appeals turns upon an analysis of the particular facts of this case 12

II.

There is no conflict of decision 14

III.

The decision of the Court of Appeals is clearly correct 16

1. There is no presumption that the 1945 national conspiracy continued in defiance of the court's injunction. But even if there were such a presumption, it was overcome by substantial evidence that in 1949 to 1951 respondents were not engaged in any conspiracy in Los Angeles 16

2. The testimony of the executives who determined the run which their respective companies would license to the Baldwin constituted substantial evidence of no conspiracy 17

3. The trial court did not make an erroneous application of the rule of reason 20

Conclusion 24

TABLE OF AUTHORITIES CITED

CASES — PAGE

Balian Ice Cream Co. v. Arden Farms Co., Inc., 94 F. Supp. 796, 104 F. Supp. 796 23
Bigelow v. RKO, 205 F. 2d 231 16
Coates v. United States, 59 F. 2d 173 16
Cooper v. Dasher, 290 U. S. 106 16
F. & A. Ice Cream Co. v. Arden Farms, 98 F. Supp. 180 23
General Pictures Co. v. Electric Co., 304 U. S. 175 13
Graver Mfg. Co. v. Linde Co., 336 U. S. 271 14
Hyde v. United States, 225 U. S. 347 16
Interstate Circuit v. United States, 306 U. S. 208 19
Labor Board v. Waterman S.S. Co., 309 U. S. 206 13
Local 167 v. United States, 291 U. S. 293 20
Marino v. United States, 91 F. 2d 691 16
Milgram v. Loew's, 192 F. 2d 579 20
National Labor Relations Board v. Lightner Pub. Corp., 128 F. 2d 237 17
Partmar Corporation v. Paramount Pictures Theatres Corp., 347 U. S. 89 3
Theatre Enterprises, Inc. v. Paramount, 346 U. S. 537 ..... 14, 17, 21
Timken Roller Bearing Co. v. United States, 341 U. S. 593 16
United States v. Food and Grocery Bureau of Southern California, 43 F. Supp. 974; aff'd, 139 F. 2d 973 23
United States v. Heating, Piping & Air Conditioning Contractors Association, 33 F. Supp. 978 23
United States v. Paramount 334 U. S. 131 ..... 5, 10, 11, 13, 14, 17, 18, 21
United States v. Richfield Oil Corp., 99 F. Supp. 280; aff'd, 343 U. S. 922 23
United States v. Standard Oil Co., 78 F. Supp. 850; aff'd, 337 U. S. 293 23

MISCELLANEOUS

Procedure in Antitrust and Other Protracted Cases (12 F. R. D. 62) 23
World Almanac (1954) 2

IN THE

Supreme Court of the United States

October Term, 1954.
No. 425.

FANCHON & MARCO, INC.,

Petitioner,

vs.

PARAMOUNT PICTURES, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Statement of the Case.

Petitioner's "Statement of the Case" is at variance with the evidence and with the findings of the trial court. By misstatement of some facts, by only partial statement of others, and by lifting statements of the trial court out of context, petitioner's Statement of the Case creates an entirely erroneous impression of the record. For that reason, respondents deem it necessary to set forth the following statement of the case which faithfully reflects the facts of record.

Petitioner was the operator of a circuit of theatres,—3 in Los Angeles and 25 in St. Louis. It was closely

associated with corporations which operated 13 other theatres in and about Los Angeles. Petitioner and those corporations had officers, directors and stockholders in common and were represented by the same individuals in the licensing and booking of pictures. [Exs. A and B; R. 805, 384, 386, 783-784, 787, 986, 1098, 3287-3291, 3648-3650.]

Respondents (using the names under which they are commonly known) are Paramount, Loew's, RKO, Universal, United Artists, Twentieth Century-Fox and Fox West Coast. Neither Columbia nor Warner Bros. was a party to this action at the time of trial.

On August 10, 1949, petitioner opened the Baldwin Theatre. The Baldwin is a neighborhood theatre in a new subdivision project on the northerly slopes of the Baldwin Hills, an undeveloped area near the fringe of the urban core of Los Angeles.[1] There are a few business establishments in the vicinity of the Baldwin—a market, some small shops and a drive-in-restaurant—but there is also much vacant property in the area. [R. 2875-2878, 2900, 2904-2905, 2918-2919, 2555, 2457, 3259-3260, 2877, 2915; Ex. 29A; R. 1187; Court's Ex. 1; R. 423.]

Licensing of first runs: Petitioner states that the trial court found that the distributors uniformly and unani-

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[1]Petitioner states that the Baldwin Theatre is "located nearer the center of the area population than any other theatre." (Pet. 8.) That statement is not supported by evidence and even if it were it would not qualify the Baldwin to play a showcase first run policy. The center of population of the United States is 8 miles north/northwest of Olney, Illinois (1954 World Almanac). A theatre in the wheatfields outside of Olney would no more be qualified to play a showcase first run than would the Baldwin, located on the edge of urban Los Angeles adjoining hundreds of acres of uninhabited property.

mously limited first runs "to their controlled theatre corporations" and that the same control of those corporations that existed during the period of the government case continued to exist during the period laid in the complaint. (Pet. 11, 13.) Both the trial court's findings and the evidence are to the contrary.

The evidence clearly shows how each distributor, acting individually, licensed its pictures first run since the opening of the Baldwin Theatre and why it followed a particular practice.

Since prior to 1942 petitioner itself has operated the Downtown Paramount Theatre and the Hollywood Paramount Theatre.[2] During the period involved in this action every Paramount picture, with one exception, was exhibited first run by petitioner itself exclusively in those two theatres.[3] [Ex. Z-1; R. 2311, 181-182, 781, 782, 382-383.]

Except for the first few months after the opening of the Baldwin Theatre, respondent Loew's licensed all of its pictures first run during the period involved in this

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[2]Prior to December 31, 1949, respondent Paramount had an ownership interest in these two theatres, but they were operated by petitioner and respondent Paramount had no control over them. On December 31, 1949, respondent Paramount's ownership interests in those theatre properties were transferred to United Paramount Theatres Corporation, an independent exhibitor unaffiliated with any distributor. [R. 2381.]

[3]Petitioner states that it operated those theatres "subject, however, to the many restraints and discriminations described in the Paramount case." (Pet. 7.) That statement is unsupported by any evidence. The fact is that petitioner had a highly advantageous valid franchise from Paramount by which it was guaranteed to receive a steady flow of first run pictures in its two showcase theatres consisting of substantially all of the pictures distributed by Paramount. (*Partmar Corporation v. Paramount Pictures Theatres Corp.*, 347 U. S. 89 (Feb. 8, 1954).)

action to theatres operated by one or more of the following independent exhibitors: United Artists Theatres Circuit,[4] Metropolitan Theatres Corporation, Galston & Sutton and Sherill Corwin. All these exhibitors were unaffiliated with any distributor. Their first run theatres were located in Downtown Los Angeles, Hollywood and the Wilshire District. [Ex. Z-2; R. 2314, 3108-3109, 3262, 3116, 767-769.]

During the period involved in this action RKO licensed most of its pictures first run to the RKO Hillstreet in Downtown Los Angeles and the Pantages Theatre in Hollywood. Both of these theatres were operated by RKO until December 31, 1950, at which time they were transferred to RKO Theatres Corporation, an independent exhibitor unaffiliated with any distributor. [Ex. Z-3; R. 2316, 3297, 3316-3317.]

During the period involved in this action Universal licensed its pictures first run to the United Artists Theatre in Downtown Los Angeles and to theatres in Hollywood and the Wilshire District. It also licensed pictures to the Studio Theatre near Universal City, and sometimes to the Culver Theatre in Culver City. Since December, 1949, the United Artists Theatre has been operated by United Artists Theatres Circuit, an independent. The other theatres (and the United Artists Theatre prior to December, 1949) were operated by Fox West Coast, a subsidiary of Twentieth Century-Fox. [Ex. Z-4; R. 3402-3404, 3107, 3116, 3495, 1460.]

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[4]United Artists Theatres Circuit never has had any connection with respondent United Artists Corporation. Since November, 1949, it has been an independent unaffiliated operator of a circuit, just as petitioner is an independent unaffiliated operator of a circuit. [R. 3495.]

Prior to May, 1950, respondent United Artists (not connected in any way with United Artists Theatres Circuit) licensed its pictures first run in four theatres operated by an independent exhibitor unaffiliated with any distributor. These theatres were located in Downtown Los Angeles, Hollywood and the Wilshire District. In May, 1950, this independent exhibitor changed its policy and was no longer desirous of playing United Artists pictures first run. Thereafter United Artists obtained first run playing time in whatever theatres it could interest in its pictures in Downtown Los Angeles and Hollywood. A number of its pictures were licensed first run to the Downtown Paramount and the Hollywood Paramount, operated by petitioner. [Ex. Z-5; R. 2318, 3530-3534, 3495, 767-769, 2198, 3502-3504.]

Respondent Twentieth Century-Fox, to which the judgment of February 8, 1950, in *United States v. Paramount* was applicable, exhibited its own pictures first run in the theatres operated by Fox West Coast, its wholly-owned subsidiary. Its right so to license its pictures was expressly recognized and reserved to it in that judgment. Paragraph V of the judgment of February 8, 1950, stated:

> "Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for the completion of the plan of reorganization provided for in Section IV, to license, or in any way to provide for, the exhibition of any or all of the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as

may be satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries." [Ex. 48.]

It is not a fact that first runs were confined to theatres operated by subsidiaries or affiliates of distributors. Many first runs were licensed to independent exhibitors.

Reasons for licensing first runs in Downtown Los Angeles, Hollywood and sometimes the Wilshire District: All of the distributors licensed their first runs to theatres in the Downtown and Hollywood areas of urban Los Angeles. Some, but not all, of the distributors, such as Twentieth Century, Universal and Loew's for a time, regarded the Wilshire District as being of such importance as an urban center that they sought an additional first run outlet in the Wilshire District. [Ex. Z-2; R. 2314; Ex. Z-4; R. 2317, 1218-1219, 812-814.]

The two great centers of urban Los Angeles are Downtown Los Angeles and Hollywood. [R. 2878-2880.] The geographical and population characteristics of Los Angeles and the importance of that city in the motion picture world make it essential that every distributor show its pictures first run in these two great urban centers. There was no dispute about this. Marco Wolff, Vice-President of petitioner, testified that it was good business practice to exhibit pictures first in Downtown Los Angeles and on Hollywood Boulevard. [R. 818-819.]

The reasons for playing pictures first run in the Downtown and Hollywood areas are fully set forth in the evidence. [R. 2371-2372, 2378-2379, 2627-2628, 3125-3126, 3297-3298, 3407.] The theatres in those areas are located in great business and shopping centers. These

centers, with their important stores, fine hotels and restaurants, intriguing window displays and bright lights, generally attract crowds. There is much pedestrian traffic passing them. [R. 3126.] They are able to operate matinees, as well as evening performances because these important shopping centers attract large daytime crowds that drop in to the theatres for the matinee. [R. 2376-2377.] That is the reason there are so many theatres, most of them of a deluxe character, clustered in these two areas.

The persons who patronize the Downtown Hollywood and Wilshire District theatres come from all parts of the Los Angeles metropolitan area and if a picture is well attended in the large deluxe theatres in those urban centers, its reputation spreads by word of mouth throughout the entire area. [R. 2428, 3298.] Thus, as the picture plays through successive runs, thousands of patrons will be waiting to see the picture in their neighborhood houses at lesser prices and at more convenient times, their interest having been stimulated by the "showcase" exhibitions in the great Downtown and Hollywood theatres. In order that the "showcase" runs may be successful (and thus "establish" the picture for subsequent runs) large sums are expended by the distributors for advertising, sometimes in excess of the returns received from the "showcase" exhibitions. [R. 2371, 3230.]

There are other reasons why it is essential that first runs be played Downtown and in Hollywood. The Los Angeles area is the motion picture capital of the world. The first run showings here are "covered" by columnists and feature writers whose observations and reviews are published nationally. Unless the first run showings are well attended and successful, adverse publicity on a na-

tional scope might follow. And, to the contrary, successful first runs in this area command favorable publicity on a national scope. [R. 2371.]

Furthermore, the showcase theatres pay large film rentals and they can afford to pay such rentals because they have the right to play the first runs with clearance over other theatres in the competitive area. [R. 2371.] All of Los Angeles County, except the Long Beach-Wilmington-San Pedro area and the Pomona area, is competitive, on a first run basis, to Downtown Los Angeles and Hollywood. That is to say, people from all of Los Angeles County (with those exceptions) attend the great showcase theatres in the two principal metropolitan entertainment centers, Downtown Los Angeles and Hollywood. [R. 2435-2436.] There may not be great numbers from any one area of the county, but altogether the suburban areas contribute a substantial portion of the patronage of the showcase theatres. [R. 3244-3245.] Petitioner's answers to interrogatories and Marco Wolff's testimony are in accord with these statements. [R. 3652, 904-907.] It is a principle of economics in the business of distributing motion pictures recognized by all (including Marco Wolff) that the earlier the run, the greater the area of competition. [R. 907.] Thus, the area of competition for first run is almost county-wide whereas the area of competition for subsequent runs is smaller. [R. 907, 916-918.] The result of these "facts of life" in the business of distributing motion pictures is that the licensing of additional first runs in the competitive area tends to dilute the patronage of the "showcase" theatres, which in turn, decreases their ability to pay large film rentals and to contribute toward

the extensive advertising and exploitation a picture receives on its first release.

It was for these, and other valid business reasons thoroughly demonstrated by the evidence, that the majority of the distributors, acting individually, required that their pictures receive first run exhibition in the Downtown and Hollywood areas (and on occasion in the Wilshire area) and refused to dissipate their value by exhibiting them on that run in neighborhood theatres.

Licensing of subsequent runs: Since 1945, the date as of which the findings were made in *United States v. Paramount* after remand (Findings of Feb. 8, 1950, [Ex. 47; R. 1595]), there have been many changes in the methods of the respective distributors in distributing motion pictures in the Los Angeles area. Not only have first runs been frequently licensed to independent exhibitors, but the method of licensing subsequent runs has undergone profound changes. If there ever was a fixed system of runs and clearances in the Los Angeles area, it had ceased to exist by the time petitioner's Baldwin Theatre opened on August 10, 1949. Each of respondent distributors acting individually, has made its subsequent run pictures available to any theatre which desired them, regardless of past relationship or ownership. [Ex. AW, R. 2637; Ex. AX, R. 2653; Ex. AY, R. 2654; Ex. BR, R. 3381; Ex. BU, R. 3417; Ex. BI, R. 3129; R. 2469-2472, 2637-2662, 3317-3319, 3380-3381, 3417-3422.]

Changes in theatre ownership of Fox West Coast: With respect to the theatre ownerships of respondent Fox West Coast, the record shows that numerous changes occurred between 1945 and the date of the opening of the Baldwin Theatre. Between December 31, 1946, the date

of the trial court's first decision in *United States v. Paramount* [R. 3074, Ex. BG], and the date of trial in the case at bar, the number of Fox West Coast theatres in Los Angeles County was reduced from 131 to 91, a reduction of about 33%. The trial court was sufficiently impressed with the diminution in size, power and number of theatres operated by Fox West Coast following the divestiture orders in the decree of December 31, 1946, that he devoted several pages of his opinion to this evidence. [R. 158-162.]

Clearance of first runs over subsequent runs: Petitioner states that by a "conspiratorial process of classification" (Pet. 10) the Baldwin was licensed to play on a 21-day clearance after close of Downtown Los Angeles. Both petitioner's and respondents' witnesses testified that a clearance of 21 days for the Baldwin was reasonable; the evidence on this subject was uncontradicted.

Petitioner constructed its Baldwin Theatre within the urban core area of Los Angeles, from which area the showcase theatres may be expected to draw their greatest patronage. The earliest availability after first run afforded any of the theatres in that area, a number of which are larger and as fine as the Baldwin, is 3 weeks or 21 days. Every distributor offered the Baldwin such availability, equivalent to the best offered other theatres in the same urban area whether operated by Fox West Coast or by independents. Harry Arthur, Jr., President of petitioner, admitted that a 21-day clearance for the Baldwin Theatre was "not unreasonably long." It was his view that even a longer clearance in favor of the first run theatres would be reasonable. His testimony is quoted in the trial court's opinion [R. 153-156] and can also be found in the Transcript. [R. 3548-3555.] Marco Wolff,

Vice-President of petitioner, also conceded that a 21-day clearance as to the Baldwin was reasonable. [R. 911-913.]

The trial court found in accordance with this testimony that the 21-day availability was reasonable. [Finding 25; R. 193.]

Findings of no conspiracy: There were differences in the detail of distribution by the several distributors, but fundamentally, they were confronted with the same problems and fundamentally their respective reactions were similar. The trial court found that these similarities were not the result of conspiracy or agreement, but were "the result of each distributor defendant meeting, on economic and other reasonable grounds, similar situations in a similar manner." [Findings 15, 22 and 26; R. 187, 192, 194.]

Upon a consideration of all of the evidence introduced, including the decrees in *United States v. Paramount,* the trial court found (speaking as of May 3, 1948 and thereafter) [R. 172] that there was no conspiracy in the licensing of first runs in Los Angeles [R. 186], that none of the respondents maintained a fixed system of runs or clearances [R. 193], that constant changes were made in the availabilities and clearances of theatres [R. 193], that the run and clearance accorded the Baldwin was not the result of any conspiracy [R. 194], and that all determinations made by respondents with respect to the Baldwin were made individually and without conspiracy. [R. 195.]

The Court of Appeals said,

> "The elaborate findings of fact have been reviewed, and there is no one of them which is clearly erroneous. Indeed, on the record, the court affirms all the findings." (Pet. Appendix 34.)

ARGUMENT.

This case was before the court during the 1952 Term (No. 708) on petitioner's attempt to obtain review here prior to decision in the Court of Appeals. This court denied certiorari. (345 U. S. 964.) Petitioner now seeks review of substantially the same questions as were presented by the petition filed and denied during the 1952 Term.

I.

The Decision of the Court of Appeals Turns Upon an Analysis of the Particular Facts of This Case.

Twice during the course of its opinion, the Court of Appeals correctly emphasized that "the appeal relates entirely to questions of fact." (Pet. Appendix 35, 38.) Nevertheless, the Court of Appeals "reviewed the long and complicated record with extreme care because of the questions of fact so raised." (Pet. Appendix 39.) At the conclusion of its opinion affirming the trial court, the Court of Appeals said, ". . . we do not believe an appellate court, already burdened, should have been required to pass on such questions." (Pet. Appendix 39.)

Examination of the opinion and briefs in the Court of Appeals shows that the arguments relied upon there are basically the same ones urged as ground for review here. The crux of the case is whether there was a conspiracy in the licensing of motion pictures in Los Angeles in 1949 to 1951. The trial court (Yankwich, J.) found that there was no conspiracy at all during the period laid in the complaint. The Court of Appeals not only expressly confirmed this finding and all others but remarked that ". . . we do not think the appeal on the facts and the weight of the evidence in this case from an able and experienced

judge who has had experience in the area was justified." (Pet. Appendix 34, 39.) The petition for certiorari is is a further attempt to overturn the factual determination.

As in the court below, petitioner contends that the trial court erred in failing to find that the *prima facie* evidence supplied by the introduction into evidence of the decrees in *United States v. Paramount* outweighed the oral and documentary evidence which showed that there was no conspiracy in the licensing of motion pictures in Los Angeles in 1949 to 1951. This contention only serves to emphasize the essentially factual nature of the questions presented for review here. As this court said in *Theatre Enterprises,* "the Paramount decrees, even if admissible, were only *prima facie* evidence of a conspiracy covering the area and existing during the period there involved" (346 U. S. 537, 541). The complete answer to petitioner's attempt to invite review here by raising questions concerning the Paramount decrees is contained in the following statement of the Court of Appeals:

> "The trial court clearly stated the rule of the statute and gave these decrees and judgments the effect of *prima facie* evidence in favor of appellant as though it had been a party thereto, but properly found under the evidence as a whole that the presumption was rebutted and that appellees were not at the time conspiring to discriminate against the Baldwin or appellant." (Pet. Appendix, 36.)

The petition in this case falls squarely within the principle that, "Granting of the Writ would not be warranted merely to review the evidence or the inferences drawn from it." *General Pictures Co. v. Electric Co.,* 304 U. S. 175, 178. See also, *Labor Board v. Waterman S. S. Co.,* 309 U. S. 206, 208. This is especially so

where, as here, the findings of fact made by the district court have been expressly confirmed by the Court of Appeals. In that situation, this court has often held that

> "a court of law, such as this court is, rather than a court for the correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (*Graver Mfg. Co. v. Linde Co.,* 336 U. S. 271, 275, and cases cited.)

II.

There Is No Conflict of Decision.

The only conflict of decision urged by petitioner is with *United States v. Paramount,* 334 U. S. 131. The alleged conflict is based on the holding of the Court of Appeals that the District Court was correct in finding that there was no conspiracy in Los Angeles in 1949 to 1951. It is clear that this holding is not in conflict with the *Paramount* decision. As this court has pointed out, the *Paramount* case had reference to conditions in the year 1945[5] and, moreover, did not adjudicate that a conspiracy as to runs and clearances existed in Los Angeles or any other particular area. *Theatre Enterprises, Inc. v. Paramount,* 346 U. S. 537, 543.

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[5]Petitioner contends that by reason of Finding 158 dealing with evidence after remand of the case, "The findings in the *Paramount* case reflect the conditions existing as late as February, 1950." (Pet. 23.) Petitioner fails to point out that Finding 158 expressly provides that the evidence submitted after remand "has been used by the Court in making its findings as to the situation in 1945." [Ex. 47; R. 1605.]

Furthermore, the evidence in this case shows that if there ever was a conspiracy with respect to the distribution of motion pictures in Los Angeles it had ceased by the time the Baldwin opened in 1949. The above Statement of the Case shows that at least as early as 1948 profound changes occurred in theatre ownership and operation and in distribution practices. Commencing at least as early as 1948, constant changes were made in the runs and clearances of theatres, properly located independent theatres were licensed many first runs, and subsequent runs were made available to exhibitors regardless of theatre ownership, including the Baldwin, upon clearances which petitioner's own officers conceded were reasonable.* The trial court summarized these changes in its opinion and in its findings. [R. 173-176, 193; 100 F. Supp. 84, 95, 96, 97, 103.] Remarking on these changes, the trial court said:

> "Whatever may have been the practice of the defendants before the decree of the statutory court, it is quite evident that since then, and the entry of the consent decrees, there has been an abandonment of the condemned distributing policies, such as 'zoning,' 'block-booking,' 'key' deals, and the like, a revision of clearances and the establishment of a system of picture-by-picture exploitation." (100 F. Supp. at 95.)

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*Although petitioner refers to admission price-fixing (Pet. 10, 22, 31), no issue was tried with respect thereto. The Court of Appeals said:

> "No allegation of an attempt to fix prices is made in the complaint. And, in response to questions from the court on oral argument, counsel for appellant admitted this is not a case based upon price fixing." (Pet., Appx. 36, note 5.)

III.

The Decision of the Court of Appeals Is Clearly Correct.

1. There Is No Presumption That the 1945 National Conspiracy Continued in Defiance of the Court's Injunction. But Even If There Were Such a Presumption, It Was Overcome by Substantial Evidence That in 1949 to 1951 Respondents Were Not Engaged in Any Conspiracy in Los Angeles.

Petitioner argues that "a conspiracy, once established, is presumed to continue until the contrary is shown." (Pet. 25.) In the cases cited by petitioner[7] there were no injunctions requiring the defendants to cease the conspiracy. Petitioner's cases hold that *where there is evidence of a continuing conspiracy* (there being no decree enjoining the conspiracy), it will be presumed that a person once found to be a conspirator, *continues as a conspirator* in the absence of evidence to the contrary.

Where as in the case at bar, there is a decree enjoining the *continuance* of a conspiracy, there is no presumption that the conspiracy will be continued in defiance of the court's order. To the contrary, there is a presumption that the court's order will be obeyed. In *Cooper v. Dasher,* 290 U. S. 106, 110, speaking of a court's order, Mr. Justice Cardozo said, "We are not to presume that the order will be flouted." The same is true of orders enjoining conspiracies in violation of the antitrust laws. (*Timken Roller Bearing Co. v. U. S.,* 341 U. S. 593, 604; *Bigelow v. RKO,* 205 F. 2d 231, 233 (7th Cir.

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[7] *Marino v. United States,* 91 F. 2d 691, 695 (9th Cir. 1937). *Coates v. United States,* 59 F. 2d 173, 174 (9th Cir. 1932). *Hyde v. United States,* 225 U. S. 347, 369.

1953).) See also, *N. L. R. B. v. Lightner Pub. Corp.*, 128 F. 2d 237, 240 (7th Cir. 1942) where the court applied the presumption that an injunctive decree has been obeyed.

Even if there were a presumption that the 1945 conspiracy continued, such a presumption would, at best, constitute only a conflict of evidence which was overcome by substantial evidence that there was no conspiracy in 1949 to 1951 in Los Angeles. Furthermore, the decrees in *United States v. Paramount* could not have been *prima facie* evidence of a conspiracy as to runs and clearances in Los Angeles for the decrees did not adjudicate a conspiracy as to runs and clearances in any particular area. *Theatre Enterprises, Inc. v. Paramount,* 346 U. S. 537, 543.

2. The Testimony of the Executives Who Determined the Run Which Their Respective Companies Would License to the Baldwin Constituted Substantial Evidence of No Conspiracy.

On the issue of conspiracy, respondents introduced evidence explaining why each respondent distributed pictures in the manner shown by the evidence and denying that the manner of distribution followed was the result of conspiracy. This testimony constituted substantial evidence from which the District Court could find, as it did, that there was no conspiracy. Petitioner challenges this finding, claiming that "The men who made the denials were, as to licensing motion pictures, hardly more than glorified correspondence clerks." (Pet. 28.)

Petitioner's statement is contrary to the evidence. For Paramount, Loew's, RKO, Universal and Twentieth Century-Fox, the Western Sales Managers testified. They were the executives in charge of distribution in the West-

ern States. Two had their headquarters in New York; the other three had their headquarters in Los Angeles. These executives not only were the executives who knew why the particular distributor licensed pictures as it did in the Los Angeles area; they were the men who decided what availability should be accorded to the Baldwin. They testified why they had reached their decisions and the reasons given by them had nothing to do with conspiracy or agreement. They were business reasons—reasons which grew out of the obligations imposed by the decisions in *United States v. Paramount* and out of the economics of the distribution of motion pictures as applied to the geographical situation, population habits and physical facts in the Los Angeles area. In some instances the decisions of these executives were subject to approval of lawyers and other executives. But in no instance was the judgment of the other executives substituted for the judgment of the executives who had studied the situation, knew the facts and reached a considered conclusion as to what his company should do.[8] These executives denied joint action.

But more persuasive than these mere denials are the reasons which they gave for their decisions and the correspondence written before there was any lawsuit, which show beyond any reasonable doubt that the determinations

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[8]These statements made by petitioner are not supported by evidence: That "all decisions as to granting licenses for first run" were made "by company officials at the home office in New York City" (Pet. 12, 13); that "the function of the Los Angeles representative was merely to transmit to petitioner the denials decided upon in New York" (Pet. 13); that "as few as five men in New York * * * did determine to whom pictures should be furnished in Los Angeles and upon what basis as to run, availability and otherwise." (Pet. 27.)

made by the respective distributors as to the playing position to be accorded the Baldwin were made individually, in each instance, for legitimate and even compelling business reasons. Their whole course of conduct and the legitimacy and reasonableness of the decisions which they reached show beyond any reasonable doubt that combination, conspiracy, and agreement were not involved.

The decision in *Interstate Circuit v. United States,* 306 U. S. 208, has no application to the case at bar. There, Interstate Circuit made most extraordinary demands upon the branch managers of the distributor-defendants. These demands were not considered or acted upon by the branch managers, but were referred to executives for decision. The distributor-defendants uniformly agreed to the demands and from this uniformity in what was considered an unreasonable position, the lower court inferred conspiracy. Defendants did not offer any explanation of "the singular unanimity of action on the part of the distributors" (p. 223). No one who had anything to do with the distributors' decisions on the Interstate Circuit demands was called as a witness. The Supreme Court held that *in the absence of any reasons* why the defendants, acting individually, would unanimously agree to such extraordinary demands as were presented by Interstate Circuit, the trial court was justified in inferring that defendants acted by agreement and that this inference was supported and strengthened by the fact that the distributors failed to call any witness who knew, or was in a position to know, whether any agreement had been reached among them for concerted action (p. 225). In the case at bar, the reasons for the individual acts of the distributors were fully explained by executives who made the decisions.

The decisions in *Milgram v. Loew's*, 192 F. 2d 579, 584 (3rd Cir. 1951) and *Local 167 v. United States*, 291 U. S. 293, 298, cited by petitioner, are not in point. The fact that the court in the *Milgram* case was not persuaded by defendants' denials of conspiracy in an entirely different factual situation and that in the *Local 167* case an unfavorable inference was drawn from the failure of conspirators to testify does not indicate that the trial court and the Court of Appeals erred in finding no conspiracy in the case at bar.

3. The Trial Court Did Not Make an Erroneous Application of the Rule of Reason.

Petitioner states, "A conspiracy to refuse to license pictures to petitioner for first run use in the Baldwin theatre is unlawful in and of itself, and the reasonableness of the conspiratorial refusal on the ground of necessity or on so-called economic and business grounds is immaterial" (Pet. 29). The decisions of the trial court and the Court of Appeals in the case at bar are not in conflict with the above quoted contention of petitioner. They neither adopt nor repudiate that principle. The trial court found that there was no conspiracy at all to refuse to license first run pictures to the Baldwin. [R. 186-188; 192-196.] The Court of Appeals confirmed those findings. (Pet. 34.) In view of the findings of no conspiracy, it was unnecessary to decide and the trial court and Court of Appeals did not decide whether a conspiracy to refuse to license first run pictures to the Baldwin would be a reasonable restraint of trade.

The question of the reasonableness of the business conduct of respondents was material to the question of whether the individual license contracts constituted rea-

sonable restraints of trade. Clearances between runs of theatres in substantial competition, when not unduly extended in duration, are not unlawful: *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 145-147.

The reasonableness of the business conduct of respondents was also material to the question of whether similarity of action with respect to the Baldwin was a proper basis for an inference that such similarity resulted from conspiracy. As in *Theatre Enterprises, Inc. v. Paramount*, 346 U. S. 537 (the facts in which are almost identical to the facts in the case at bar), the respondent distributors refused to license first runs to a neighborhood theatre and instead licensed them to the big deluxe downtown "showcases." This Court held, in *Theatre Enterprises*, that conscious parallel business behavior was not itself a Sherman Act offense. On the question of whether conspiracy should be inferred from similar action, the reasonableness of the similar action was material for if the similar action is of a reasonable character, the court can properly infer that it was the result "not of previous agreement, but of solving an identical situation in a similar manner." [100 F. Supp. 84, 91; Finding 15, R. 187-188.]

At pages 29 and 30 of the petition, petitioner lifts two statements of the trial court out of context thus giving an entirely erroneous impression of the Court's viewpoint. First, petitioner quotes the statement, "No cases exist which hold that the system, in itself, is a violation of the antitrust laws" as if the trial court were referring to a conspiracy to refuse to license pictures to a particular theatre. Read in context, what the trial court said was that the method or system of licensing

pictures in successive runs with clearances between runs was not itself unlawful. At no time did the trial court say that a conspiracy to refuse pictures to a particular theatre was lawful.

Second, petitioner lifts out of context a statement of the trial court characterizing the antitrust laws as "a part of America's romantic dream." Read in context, the trial court's statement was as follows:

> "So the trouble with these articles is they are by young men who are not economists, who are lawyers, and they get mixed up in the economic details, which some of them do not understand. Chamberlin and all the others actually condemn the antitrust law, as interpreted, just as your Professor Toulmin does. But I am not interested in the theory of economists. I am interested in the way the Supreme Court has interpreted it.
>
> "As a matter of fact, I can point to an article of my own, published in the Commercial Law Journal, in which I said that antitrust laws are a part of America's romantic dream, which can never be realized in modern economics and actually maintain competition in a modern industrial system. You can quote me against myself. But, as I told you, after 5:00 o'clock I can talk one way, but up to 5:00 o'clock I conform to what the law tells me to do." [R. 3978.]

As a matter of fact, the trial judge, Leon R. Yankwich, Chief Judge of the Southern District of California, has had long experience in the antitrust field. He was a member of the committee of judges appointed by the Judicial Council of the United States to study and report on Procedure in Antitrust and Other Protracted Cases.

(13 F. R. D. 62.) He has decided many important cases involving the antitrust laws, including the following:

United States v. Standard Oil Co., 78 F. Supp. 850, affirmed 337 U. S. 293 (1948);

United States v. Richfield Oil Corp., 99 F. Supp. 280, affirmed 343 U. S. 922 (1951);

Balian Ice Cream Co. v. Arden Farms Co., Inc., 94 F. Supp. 796, 104 F. Supp. 796 (1950);

F. & A. Ice Cream Co. v. Arden Farms, 98 F. Supp. 180 (1951);

United States v. Food and Grocery Bureau of Southern California, 43 F. Supp. 974, affirmed 139 F. 2d 973 (1942);

United States v. Heating, Piping & Air Conditioning Contractors Association, 33 F. Supp. 978 (1940).

Petitioner has lifted a number of other statements of the trial court out of context to give an entirely erroneous impression of what the trial court said. For example, petitioner quotes the trial court as saying, "I will admit monopoly . . . So what? What does that mean?" [R. 2238.] Judge Yankwich was referring to petitioner's attempt to prove monopoly prior to 1945 and was saying that it was of little or no significance what the situation was in 1945; that the material question was what the situation was in 1949 to 1951, the period laid in the complaint.

An examination of the record as a whole will demonstrate that Judge Yankwich fairly and correctly applied the law to the facts and that his comments thereon were wise and appropriate. We submit that the implications created by petitioner's use of the trial court's comments out of context are unfair.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

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